Postal Regulatory Commission
Submitted 1/23/2012 5:12:19 PM
Filing ID: 79900
Accepted 1/24/2012

**BEFORE THE POSTAL REGULATORY COMMISSION**
**WASHINGTON, D.C. 20268-0001**

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**Review of Nonpostal Services** **Docket No. MC2008-1 (Phase IIR)**

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# REPLY COMMENTS OF PITNEY BOWES INC.

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DATED: January 23, 2012

## I. INTRODUCTION

Pitney Bowes Inc. (Pitney Bowes) respectfully submits these comments in reply to the initial comments filed by LePage's 2000, Inc. and LePage's Products, Inc. (LePage's), the U.S. Postal Service, and the Public Representative.[1]

## II. DISCUSSION

In Phase II, based on its exploration of a more complete record on commercial licensing activities, the Postal Regulatory Commission expanded and refined its Phase I analysis and explicitly recognized considerations that were implicit in its Phase I decision. These considerations led it to distinguish between different types of licensing activities based on the primary purpose of the license. The Commission can use this remand to more fully explain why that was reasonable and necessary. Additionally, the Commission can use this remand to explain why it is reasonable and necessary to take into account the direct and indirect effects of a licensed product in the market, not only assessing the possible benefits of the licensing activities, but also for assessing the potential consumer and economic effects for purposes of determining whether the required unmet public need for the product exists. *See* 39 U.S.C. § 404(e)(3). The Commission can also use this remand to affirm and explain why commercial licensing activities in connection with USPS-branded mailing and shipping products offered for sale at nonpostal retail outlets are properly classified as a nonpostal service.

### A. The Purpose of the Remand

It is helpful to review the purpose of this remand proceeding. The Court remanded aspects of the Phase II decision because the Commission had not adequately explained its

[1] *See* Comments of LePage's 2000, Inc. and LePage's Products, Inc. to the Commission's Notice and Order Establishing Procedures on Remand (LePage's Comments)(Jan. 13, 2012); United States Postal Service Initial Comments on Remand (USPS Comments)(Jan. 13, 2012); Public Representative Comments in Response to Order No. 1043 (PR Comments)(Jan. 13, 2012).

departure from its Phase I decision that approved licensing as a "general service." The Postal Service and LePage's argue that the remand compels the Commission to revert to its Phase I decision. That is incorrect. The "work" contemplated by the Court on remand, 642 F.3d at 235, is for the Commission to more fully explain how the Commission's Phase II decision modified its decision in Phase I, and to provide a fuller explanation as to why the Commission's Phase II decision with respect to commercial licensing is justified.

It is well-settled that an agency is free to modify "precedents or practices it no longer believes are correct," but in doing so it must "supply a reasoned analysis indicating that prior policies and standards are being deliberately changed." *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1296 (D.C. Cir. 2004)(per curium). Further, it may do so because "an agency's view of what is in the public interest may change, either with or without a change in circumstances." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (internal quotation marks omitted).

Additionally, the Commission's decision on remand is entitled to deference. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S. Ct. 1800, 1810–11 (2009) (APA imposes no heightened standard of judicial review when an agency modifies its position); *Am. Farm Bureau Federation v. EPA*, 559 F.3d 512, 522 (D.C. Cir. 2009)(agency may "reasonably make a different policy judgment, then it need only explain itself and we will defer"); *State Farm*, 463 U.S. at 42 (agency "must be given ample latitude to adapt [its] rules and policies to the demands of changing circumstances")(internal quotation marks omitted).

### B. The Commission was Justified in Considering the Purpose of the Licensing Activity in Assessing Whether Different Types of Nonpostal Licensing Activities May Continue Under Section 404(e)

One of the questions posed on remand is whether the Commission reasonably distinguished between licensing for promotional purposes and licensing for commercial purposes in assessing whether a public need for that licensing exists and whether the private sector can meet the public need (if it does exist). *See* 39 U.S.C. § 404(e); Order No. 1043 at 5. This question highlights the fundamental difference between the Commission's Phase I and Phase II analyses. The Commission's Phase II analysis recognized that all licensing activities are not the same. Thus, consideration of the purpose of the licensing activity was necessary to assess whether different types of licensing activities could continue under section 404(e). Indeed, the purpose of a license is central to determining whether there is a public need that cannot be met by the private sector without the license, as is required for the nonpostal licensing activity to continue. *See* 39 U.S.C. § 404(e).

In Phase II, the Commission found that approval of the general conduct of licensing as a nonpostal service was overly broad and would almost certainly, as revealed by Postal Service comments, lead to results that were contrary to the letter and underlying intent of the Postal Accountability and Enhancement Act of 2006 (PAEA).[2] The Phase II analysis reflects a more nuanced approach, taking into account the primary purpose of different types of nonpostal licensing activities. In Phase II, the Commission recognized that the public need for various licensing activities must be assessed in relation to some end product or service or group of products or services, in order to apply the statute.

[2] The Postal Service's initial comments make clear that it believes that the Commission's Phase I approval of its general licensing authority necessarily compels the approval of any future licensing activity, regardless of the purpose of the license, the nature of the goods being licensed, the identity of the seller of the licensed goods, or the location of the sale of the licensed goods. *See* USPS Comments at 1, 6.

Using this analysis, the Commission concluded that licensing activities that serve a primarily promotional purpose could continue as a grandfathered nonpostal service. *See* Order No. 392 at 8. However, the Commission concluded that licensing activities for the sale of USPS-branded mailing and shipping products in nonpostal retail outlets (commercial licenses) could not continue because they did not meet a public need that could not be met by the private sector. *See* Order No. 392 at 25. The Commission acknowledged that commercial licensing shared some of the benefits of promotional licensing, but it concluded that any public need for commercial licensing of mailing and shipping products could be adequately met by the private sector and that the benefits associated with this type of licensing were outweighed by disadvantages unique to commercial licensing of mailing and shipping products. *See* Order No. 392 at 12-25. Specifically, the Commission cited a number of concerns regarding potential consumer confusion, market distortion, and unfair competition that are unique to licensing activities for the sale of USPS-branded mailing and shipping products at nonpostal retail outlets. *See* Order No. 392 at 9, 19-23.

The Postal Service and LePage's argue that the Commission's Phase II analysis impermissibly places the focus of the inquiry on the *products* being licensed rather than on the *activity* of licensing generally, and that it is improper to consider the Postal Service's licensing activities in relation to some end product or group of products. *See* USPS Comments at 5; LePage's Comments at 30-31. Yet this type of consideration was implicit in the Commission's Phase I decision approving the "general service" of licensing – which the Postal Service and LePage's support. *See* USPS Comments at 5; LePage's Comments at 4.

The "benefits" associated with the general service of licensing – revenue generation, promotion, brand recognition, advertising and image enhancement – that the Commission

identified in Phase I are all predicated on the direct and indirect effects of the licensed products in the market. For example, the prospect of generating revenues through various licensing arrangements presupposes the sale of (and royalty payments from) licensed products in the market. Similarly, the promotional value of licensing the Postal Service's brand (i.e., increased recognition, advertising, image enhancement) cannot be derived solely from the act of entering into a new license agreement. There is no promotional benefit in granting a license, per se. Rather, any benefit that may flow from the license is wholly dependent on the product or service that is being licensed. In short, because the "act of licensing" itself cannot convey these benefits, the Commission's Phase I decision implicitly considered the effects of the licensed goods in the market. The simplistic test advocated by the Postal Service and LePage's misses this point.

Moreover, just as the direct and indirect effects of the licensed products were considered in assessing the "benefits" of licensing activities under the public need test, it also is appropriate for the Commission to consider the indirect and direct consumer and economic effects of the relevant licensing activity in applying that same test. In fact, for the reasons stated in our initial comments, the direct and indirect consumer and economic effects of a given licensing activity may touch on the elements of the public need test articulated by the Commission in Phase I – demand for the service, availability, usefulness – that most closely align with the *public* need (as distinguished from the Postal Service's needs). *See* PB Comments at 15. Of course, the Commission is not bound by its Phase I decision in determining what factors should be included is its assessment of the public need, but consideration of consumer and economic effects are compatible with the factors previously identified. As the Public Representative notes, consumer effects, including "consumer confusion," should be considered appropriate metrics for determining the public need because they relate to the "usefulness" of the proposed nonpostal

service. *See* PR Comments at 6, n.8. Similarly, an assessment of economic effects, including the potential for market distortion and unfair competition, relates to the "demand" and "availability" factors that the Commission previously identified as appropriate factors to consider in determining the public need for a proposed nonpostal service.

### C. The Commission Reasonably Distinguished between Direct Sales Activities and Licensing Activities; this Distinction Supports the Classification of Commercial Licensing of USPS-Branded Mailing and Shipping Products for Sale at Nonpostal Retail Outlets as a Nonpostal Service

In Phase I, the Commission determined that licensing is *not* a postal service. *See* Order No. 154 at 71; Order No. 171 at 4. No party challenged this finding before the agency and no party challenged this determination in the appeal of the Phase I decision. *See USPS v. PRC*, 599 F.3d 705 (D.C. Cir. 2010). The argument that commercial licensing of mailing and shipping products for sale at nonpostal retail outlets should be classified as a postal service was raised for the first time by LePage's on appeal. *See* LePage's Brief to D.C. Cir. (Jan. 28, 2011) at 18.

On appeal, the Commission reasonably distinguished between the Postal Service's commercial licensing activities for mailing and shipping products sold at nonpostal retail outlets and its direct sales activities under the ReadyPost program. The Commission's basis for that distinction was that the Postal Service is "directly managing" sales at its own retail outlets, whereas its involvement with sales of branded, commercially licensed products at private sector stores is limited to the terms of the license. The Court held that the Commission "may well be correct that the crucial distinction is the seller's identity," but that it could not consider the merits of that position because it had not been adequately explained in the Commission's Phase II decision. *See* 642 F.3d at 232.

In its Phase II decision, the Commission recognized the important distinction between the Postal Service's *direct sales* activities and the Postal Service's commercial *licensing* activities:

> A fundamental dichotomy exists within the PAEA between postal services such as the sale of ReadyPost packaging at post offices, and the nonpostal service of licensing Postal Service brands for use on retail mailing and shipping products. Under the PAEA, the former is a postal service rising to the level of a core business, the sales of which are directly managed by the Postal Service; the latter is a nonpostal service under the control of licensees and merchandisers which must be terminated unless, together with other factors, the Commission finds a public need for the service that the private sector is unable to meet.

Order No. 392 at 17.

The Court overlooked this discussion, but the Commission now has the opportunity to elaborate on the reasons it set forth earlier.

In Phase II, the Commission correctly recognized that, "[a]lthough the sale of licensed products at retail stores in nonpostal locations and the sales of ReadyPost packaging supplies to customers in postal facilities are similar, the Commission's responsibilities when deciding whether to authorize postal, vis-à-vis nonpostal services, differ significantly." *Id*. The Public Representative elaborated on this point, observing that the seller's identity is crucial because it determines the scope of the Commission's regulatory oversight authority:

> The Commission's oversight authority with respect to whether other entities are following the requirements of Title 39 is virtually nonexistent. Allowing the Postal Service to license its mailing and shipping products and then effectively escape much of the oversight and regulation envisioned under the statutory scheme would turn the statute on its head.

PR Comments at 4.

Pitney Bowes agrees. The distinction the Commission makes and the Public Representative supports between the Postal Service's direct sales activities and its licensing activities is consistent with the PAEA's commitment to transparency and accountability. One of the fundamental purposes underlying section 404(e) was to ensure that any nonpostal service offered by the Postal Service be subject to review and oversight by the Commission. *See* Order No. 154 at 10, 22 (discussing extensive legislative and regulatory history preceding passage of

the PAEA in which the Postal Service argued that the Commission's authority to regulate nonpostal services was limited). The distinction recognized by the Commission between the Postal Service's *direct sales* activities and the Postal Service's commercial *licensing* activities ensures that the Commission can maintain appropriate oversight. These concerns are especially acute where the Postal Service's licensing activities relate to its operations. *See* Order No. 392 at 9 ("The licensing of Postal Service trademarks for use on commercial mailing and shipping products related to postal operations poses special issues . . . .").

The Postal Service cites the Commission's approval of Customized Postage as a postal service to support its argument that licensing activities should be deemed a postal service. *See* USPS Comments at 10. LePage's makes a similar claim. *See* LePage's Comments at 12-13, 15-16, 18. But the postal character of the Customized Postage program flows from a separate source. The Postal Service's authority to prescribe the manner of postage payment, to provide and sell postage stamps, and "to provide such other evidences of payment of postage . . . as may be necessary or desirable" is expressly provided for in statute. *See* 39 U.S.C. §§ 404(a)(2), 404(a)(4). The Commission cited this unique statutory authority in approving the program as a postal service. *See* Order No. 154 at 36. There is no analogous or extant authority to support the postal character of commercial licensing of USPS-branded mailing and shipping supplies for sale at nonpostal retail outlets, let alone compel approval as a postal service. And for the reasons cited in the Phase I decision, *see* Order No. 154 at 73, the Commission was justified in finding that such licensing activities were nonpostal services.

LePage's advances several arguments which are all variations on the theme that the Commission erred in not treating like cases alike. Specifically, LePage's argues that the differential treatment afforded to commercial licensing, ReadyPost, the Officially Licensed

Retail Program (ORLP), and the Customized Postage program in terms of classification and approvals cannot be justified. These "disparate treatment" claims fail, however, because the purportedly "like" cases are not alike. The Commission reasonably concluded that the activities offered by the Postal Service, *direct sales*, in the case of the ReadyPost and ORLP programs, and the provision of means for prepayment of postage, in the case of the Customized Postage program, are materially distinguishable from the Postal Service's commercial *licensing* activities in connection with the USPS-branded mailing and shipping supplies and products offered by third-parties for sale at nonpostal retail outlets. *See* Order No. 392 at 17; Order No. 154 at 36. LePage's disparate treatment argument would be justified if the Commission were to hold that the Postal Service could not sell LePage's mailing and shipping products in postal retail outlets as part of the ReadyPost or ORLP programs, but the Commission has made no such finding. LePage's has the same opportunity as others to engage in that type of commercial activity.

LePage's related demand that the Commission must "apply the same test to every service" is also without merit. *See* LePage's Comments at 14-16. A touchstone of the Commission's review under section 404(e) is the distinction between postal services and nonpostal services. LePage's ignores the fact that "the Commission's responsibilities when deciding whether to authorize postal, vis-à-vis nonpostal services, differ significantly." Order No. 392 at 17; *see also* PB Comments at 14-15 (discussing the fact that the PAEA compels the Commission to assess postal products under a different test than the test applied to nonpostal services).

### D. The Commission's Determination that There is No Unmet Public Need for the Postal Service to Engage in Commercial Licensing for the Sale of USPS-Branded Mailing and Shipping Products at Nonpostal Retail Outlets was Justified by the Record Evidence

Based on the expanded record and briefing supplied in Phase II, the Commission concluded that licensing activities for the sale of USPS-branded mailing and shipping products in nonpostal retail outlets did not meet a public need that could not be met by the private sector. *See* Order No. 392 at 25. The Commission acknowledged that commercial licensing offered some of the benefits of promotional licensing, but it concluded that any public need for commercial licensing of mailing and shipping products could be adequately met by the private sector and that the benefits associated with this type of licensing were outweighed by disadvantages unique to commercial licensing of mailing and shipping products. *See* Order No. 392 at 12-25. Specifically, the Commission cited a number of concerns regarding potential consumer confusion, market distortion, and unfair competition that are unique to licensing activities for the sale of USPS-branded mailing and shipping products at nonpostal retail outlets. *See* Order No. 392 at 9, 19-23.

No party offered any evidence to rebut the Commission's findings that mailing and shipping supplies are widely available in the private sector and that the Postal Service's licensing activities would not expand the range or quality of the mailing and shipping supplies available to consumers. *See id*. at 16. However, the Postal Service and LePage's both contend that the findings with respect to consumer confusion, market distortion and unfair competition were not supported by a sufficient evidentiary basis. *See* USPS Comments at 11-16; LePage's Comments at 30-36.

The Postal Service and LePage's both claim that the Commission's findings with respect to the potential for consumer confusion are undercut by the lack of consumer complaints about

USPS-branded mailing and shipping products. *See* USPS Comments at 11-12, 15; LePage's Comments at 30. But no complaints were necessary to justify this concern where, as here, the Commission found that the evidence submitted by the Postal Service provided a sufficient basis for its findings. The Postal Service made statements on the record that its commercial licensing activities in connection with mailing and shipping products were intended to lead consumers to "assume a certain level of quality and expertise with respect to products that bear the Postal Service's widely recognized and respected brand." *See* USPS Responses to POIR No. 1, Question 11(g). A Postal Service witness also stated that consumers would associate its commercial licensing activities and its brand with standards of "durability, legibility, and quality." *See* Declaration of Gary A. Thuro (Nov. 17, 2008)(Thuro Decl.), at 5. However, other evidence submitted by the Postal Service disavowed any unique quality control or quality assurance with respect to its commercial licensing activities for USPS-branded mailing and shipping products. *See* Thuro Decl. at 5. On the basis of this record, the Commission concluded that the brand connection perceived by consumers would lead to a false impression because, in reality, there was no actual difference between USPS-branded mailing and shipping supplies and the private label brand of the same product. *See* Order No. 392 at 20-22. Accordingly, the Commission reasonably concluded that the commercial licensing activities in connection with USPS-branded mailing and shipping supplies served to confuse, rather than inform consumers. *See id.* at 21-22.

The Postal Service and LePage's gain nothing by arguing, as they do, that the Commission erred in finding the Postal Service's status as a government entity with a monopoly over mail delivery gave rise to enhanced concerns regarding consumer confusion regarding USPS-branded mailing and shipping products. The Postal Service and LePage's attempt to

refute this Commission finding by downplaying the effects of the monopoly. *See* USPS Comments at 11 (no basis to assume that customers perceive the Postal Service "as having a special expertise as to mailing and shipping *supplies*, as contrasted to the *delivery* of mail")(emphasis in original); LePage's Comments at 32. These assertions are directly contradicted by record evidence submitted by the Postal Service itself asserting that its licensing activities would lead consumers to "assume a certain level of quality and *expertise* with respect to products that bear the Postal Service's widely recognized and respected brand." *See* USPS Responses to POIR No. 1, Question 11(g)(emphasis added). And as the Commission argued on appeal, the "Postal Service cannot seriously challenge the proposition that it is considered an authority when it comes to mailing and shipping." *See* PRC Brief to D.C. Cir. (Feb. 28, 2011) at 28.

The Postal Service further contends that the Commission's findings with respect to consumer confusion in relation to its licensing activities cannot be reconciled with the Commission's approval of the sale of USPS-branded mailing and shipping supplies as part of the ReadyPost program. *See* USPS Comments at 13. But there is no reason that the Commission's concerns regarding consumer confusion apply equally in all contexts. The Commission reasonably distinguished the sales of similar products through the ReadyPost program on the basis that the Postal Service is "directly managing" those sales. As discussed above, under the ReadyPost program both the Postal Service and the Commission have a greater ability to monitor the quality of the products being sold under the USPS-brand. In contrast, the control of the Postal Service and the regulatory oversight of the Commission are significantly diminished under a commercial licensing agreement in which USPS-branded mailing and shipping products are being sold by a third-party at nonpostal retail outlets. *See infra* at 7-8; PR Comments at 4.

The Postal Service and LePage's also claim that the market disruption and unfair competition concerns were unjustified. The Postal Service contends that "other than Pitney Bowes, no other market participant has claimed that any mailing and shipping product is anticompetitive." USPS Comments at 16. The Postal Service further contends that concerns regarding real or potential market distortion and unfair competition are "wholly illusory." *Id*.

As to the first point, the record evidence before the Commission reveals that no fewer than ten parties, including Pitney Bowes, filed comments voicing concerns regarding the anticompetitive aspects of the Postal Service's commercial licensing activities. *See* Comments of Chamber of Commerce of the United States of America (Nov. 19, 2008)("The Chamber is concerned that … [the Postal Service] may leverage its government "brand" to expand its commercial licensing program into virtually any business activity, thereby putting it in direct competition with private firms operating in commercial markets"); Comments of the Information Technology Industry Council (Nov. 20, 2008)("ITI believes that it is inappropriate for the Postal Service to compete in commercial markets unrelated to its core business"); Comments of Brother International Corporation (Nov. 24, 2008)("Brother International Corporation also believes that there are a number of licenses held by the USPS that may have an effect on product categories in which Brother competes including: inkjet and laser toner cartridges, sewing products, various labels and labeling applications, paper goods, school and office supplies, crafts and accessories, and stampers and stamp pads); Joint Comments of Association of Postal Commerce, Alliance of Nonprofit Mailers, Direct Marketing Association, National Postal Policy Council, and Parcel Shippers Association on Licensing Agreements (Nov. 24, 2008)(citing "vertical competitive issues" with Postal Service licensing activities in markets it regulates). The Commission cited these comments in its Phase II decision. *See* Order No. 392 at 13, n.18.

As to the second point, the plain language of the PAEA and the legislative history leading up to its enactment reveal deep and persistent concerns about the potential for unfair competition by the Postal Service. There is no question Congress intended to strictly limit the Postal Service's ability to offer services and products unrelated to its core business. And to the extent such products or services existed, they could continue only if an unmet public need existed. Concerns regarding the potential for unfair competition clearly underpin the language enacted in section 404(e). *See* Order No. 154 at 18-19 (citing H.R. 22, *The Postal Modernization Act of 1999*: Hearing of the Postal Service Subcomm. of the H. Govt. Reform Comm., 107th Cong. 106-16 (1999)(testimony of E. Gleiman)); *U.S. Postal Service: Development and Inventory of New Products*, GAO/GGD-99-15 (Washington, D.C.: Nov. 24, 1998), at 3-4 (noting concerns by private companies regarding the Postal Service's entry into nontraditional postal markets and potential unfair competition issues in connection with government-sponsored competition in private markets); *see also, Embracing the Future: Making the Tough Choices to Preserve Universal Mail Service*, Report of the President's Commission on the United States Postal Service (Jul. 31, 2003), at 27-28 (citing unfair competition concerns and potential market-distorting affects). In fact, many of the same concerns remain central to the current legislative debate about the future model of the Postal Service. *See* H.R. Rep. No. 112-363, pt. 1, at 55 (2012)("The Committee's decision not to allow banking or internet services recognizes the Postal Service's unique status as an establishment of the Federal Government. As a federal agency, the Postal Service enjoys a number of benefits the private sector does not. These benefits include exemptions from income tax and property tax, the ability to exercise eminent domain, preferential borrowing access, and implicit taxpayer backing in the event of a default. Serious fair competition issues arise if the Postal Service is permitted to leverage its property and

assets – including property received for free from the Federal Government when the Postal Service was created in 1971 – to compete in areas well-served by the private sector. The Postal Service possesses inherent unfair advantages over the private sector in many potential non-postal arenas.").

Similarly, LePage's contention that Congress did not intend for unfair competition issues to be taken into account under section 404(e)(3) is simply incorrect. *See* LePage's Comments at 35-36. While it is true that any grandfathered nonpostal service that is classified as a competitive product under section 404(e)(5) would be subject to the provisions of section 3633, related to cost coverage and the allocation of institutional costs, it does not follow that Congress intended section 3633 to usurp the Commission's authority to review unfair competition issues raised by nonpostal services. The restrictions on existing nonpostal services and the prohibition on new ones permits a nonpostal service to continue only if it was offered as of January 1, 2006, and *if and only if* the Commission determined the service met a "public need" that cannot be satisfied by the private sector. *See* 39 U.S.C. § 404(e). Only after the threshold tests under section 404(e)(3) are satisfied is an existing nonpostal service eligible to be classified under section 404(e)(5).

## III. CONCLUSION

For the reasons discussed above and in our initial comments, the clear intent underlying section 404(e), the record before the Commission, and the Commission's specific findings in Order No. 392, the Commission should affirm its finding that there is no unmet public need for the Postal Service to continue commercial licensing for the sale of USPS-branded mailing and shipping products at nonpostal retail outlets. The Commission should likewise affirm that the commercial licensing of mailing and shipping products offered for sale at retail locations other

than Postal Service retail facilities is properly classified as a nonpostal service. The Commission should adopt a narrowly defined public need test that addresses the consumer and economic effects of each nonpostal service under consideration.

Pitney Bowes appreciates the Commission's consideration of these comments.

Respectfully submitted:

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